APPENDIX



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1882

LAWRENCE E. BIESKI, et al, *Appellants,*

v.

EASTERN AUTOMOBILE FORWARDING COMPANY, INC., M & G CONVOY, INC., and HIGHWAY TRUCK DRIVERS AND HELPERS, LOCALS 107 and 326, Unincorporated Associations Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and EASTERN CONFERENCE AUTOMOBILE TRANSPORTERS JOINT COMMITTEE, *Appellees,*

and

JOSEPH A. SOCKLOSKY, et al., Acting on Their Own Behalf of Approximately Eighty-one Other Drivers Presently Employed by M & G Convoy, Inc., *Intervenors.*

Appeal From the United States District Court
For the District of Delaware

Argued May 30, 1974

Before KALODNER, ROSENN and HUNTER, *Circuit Judges*

Judgment Order

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,

James Hunter, III, *Circuit Judge*

Attest:

Thomas F. Quinn, Clerk

Date: June 11, 1974

APPENDIX B

Memorandum Opinion

WRIGHT, CHIEF JUDGE.

This suit originated out of the January 15, 1964 purchase of certain of the assets of the defendant Eastern Automobile Forwarding Co., Inc. (Eastern) by the defendant M & G Convoy, Inc. (M & G) and the ensuing decision by the defendant Eastern Conference Automobile Transporters Joint Committee (Joint Committee) concerning the seniority rights of the former Eastern drivers under the provisions of their collective bargaining agreement. All of the drivers of both companies were represented by the defendant Highway Truck Drivers and Helpers, Local 107, affiliated with the Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 107), and all defendants were parties to the multi-employee and multi-union collective bargaining agreement. The Eastern Conference Area Truckaway and Driveaway Agreement (Agreement). Subsequent to the transaction, a dispute arose regarding the respective seniority and job status of the M & G and Eastern drivers under the Agreement. The dispute was submitted to the Joint Conference which rendered its decision that pursuant to the provisions of the Agreement, M & G had neither acquired, purchased nor merged with Eastern, that the Joint Committee was not empowered to determine the seniority issues pursuant to the sections of the Agreement applicable to the acquisition or absorption situation, and that M & G was under no obligation to recognize any seniority or job status claim of the former Eastern employees.

In response to this decision and pursuant to § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), the plaintiffs filed their complaint charging that Eastern, M & G and Local 107 had conspired to deprive them of their seniority rights by unfairly influencing the Joint Committee's decision, that Local 107 had breached

its duty of fair representation during the proceedings before the Joint Committee and that the decision of the Joint Committee was arbitrary and made without benefit of a fair hearing. The plaintiffs sought the issuance of an injunction against the enforcement of the decision and an order that M & G admit former Eastern employees to a seniority status comparable to that of its own employees.

This Court, in denying the plaintiffs' request for a preliminary injunction [1] and again in granting the defendants' motion for summary judgment,[2] concluded that because of the terms of the Agreement, it had no power to reverse the Joint Committee decision absent substantial evidence of fraud or deceit on the part of the defendants which would vitiate or nullify the Joint Committee's action, or substantial evidence of a lack of good faith or honesty of purpose on the part of Local 107 in its exercise of its duty of fair representation. Finding no such substantial evidence, the Court held for the defendants.

On appeal, the Third Circuit ruled that this Court had too narrowly construed the scope of its authority to review decisions of the nature of the one rendered by the Joint Committee. It held that when the decision is "a jurisdictional one—that a certain dispute will not be considered on its merits by the private decision-maker—then the court is a proper forum to review this decision on the basis of its analysis of the contract entered into by the parties," 396 F.2d at 38. Concluding that under the terms of the Agreement M & G had absorbed Eastern, the Circuit Court held that the Joint Committee should have proceeded to determine the seniority dispute under the appropriate Agreement sections, and remanded the case for further proceedings before this Court and the Joint Committee.

---

[1] 231 F.Supp. 710 (D. Del. 1964) affirmed 354 F.2d 414 (3rd Cir. 1965).

[2] Opinion, August 2, 1967, reversed 396 F.2d 32 (1968).

Subsequently, on two occasions, the Joint Committee issued decisions purporting to comply with the directive of the Circuit Court and the orders of this Court concerning the resolution of the seniority issues. Neither decision met either mandate, and on March 2, 1973, this Court once again ordered that the Joint Committee hear and determine the seniority rights of the Eastern employees as a consequence of M & G's absorption of Eastern. On April 20, 1973, the Joint Committee rendered its fourth decision regarding this question.

The case is presently before the Court on the motion of M & G for an order enforcing the Joint Committee's most recent decision. In essence, M & G is desirous of a prompt determination by the Court of whether the Joint Committee has finally complied with the orders of this Court and properly assumed jurisdiction over and decided the seniority issues raised as a consequence of M & G's absorption of Eastern which the Third Circuit held were before the Joint Committee under the Agreement. Although of a somewhat unusual nature, M & G's request for immediate review of the Joint Committee decision is certainly understandable given the rather tortured path of this litigation.

In light of this factor and the obvious difficulties confronted by M & G in attempting to observe the directives of the Joint Committee under its contractual obligations as well as the orders of this Court, the Court is of the opinion that it should entertain M & G's motion and review the Joint Committee's decision to determine its compliance with the orders directing it to decide the seniority issues raised in this action. The plaintiffs have raised twenty-two specific objections to the latest decision, and the Joint Committee has filed its response to these objections.

Having reviewed the Joint Committee decision of April 20, 1973, the Court concludes that the Joint Committee did assume jurisdiction over and decide the seniority issues raised by the plaintiff pursuant to the Agreement in com-

liance with the orders of January 7, 1971 and March 2, 973, and in accordance with the procedure delineated in he Agreement. Therefore, the review of the merits of the lecision is limited to cases of fraud, deceit and breach of a luty of fair representation. These issues have been decided previously, and the plaintiffs have submitted no additional evidence to alter the Court's prior determinations.[3]

The objections raised by the plaintiff are primarily directed to the Joint Committee's evidentiary findings. Therefore, the objections are not pertinent to the jurisdictional question central to the Third Circuit's opinion and this Court's orders, but rather involve the merits of the Joint Committee's consideration and determination of the seniority issues committed to it by the Agreement. Certain of the objections do, however, require brief discussion.

The plaintiffs' first objection concerning the question of the seniority status of M & G employees hired after the absorption has some apparent merit in light of the statement cited from the Court's opinion of March 2, 1973, that the seniority status of these employees was not properly before the Joint Committee. However, the objection misperceives the Court's concern regarding this question. In its January 25, 1971 decision, the Joint Committee had considered subsequent hires and their employment seniority as a component of the underlying determination of the seniority of former Eastern drivers as a consequence of the absorption. This was countenanced neither by the Agreement nor the orders of the Court. In the latest decision, the Joint Committee evidently considered and resolved the threshold seniority issue as of the date of the absorption. Its subsequent determination of the status of post-absorption employees did not violate the Court's orders and quite clearly was a necessary element of the resolution of the entire controversy in light of the intervening years and circumstances. See 396 F.2d at 42.

---

[3] See cases cited in footnotes 1 and 2.

The plaintiffs' objection regarding the rights and status of any former Eastern drivers who may have voluntarily terminated employment with M & G has been satisfactorily answered by the oral and written representations of counsel that such cases will be decided individually by the Joint Committee and that persons who terminated employment because of their seniority status are not covered by the challenged provisions.

Finally, the plaintiffs' objection dealing with the Joint Committee's alleged failure to decide the seniority issue The Court has frequently stated its interpretation of that phase as employed in its January 7, 1971 order, and the Joint Committee's decision is in compliance with that interpretation.

The Court has purposely briefly reiterated the history of this controversy to illuminate the issues presented and the parameters of its review. The plaintiffs have repeatedly requested that the Court undertake either a comprehensive review of the merits of the Joint Committee decision or that it determine the seniority issues. The Court has consistently refused either course and has limited its efforts to insuring that the Joint Committee fulfill its contractual obligations by assuming jurisdiction over the seniority dispute. This having been accomplished, the Court has no further power of review in this controversy.

For the reasons stated above, the motion of M & G for an order enforcing the arbitration award for compliance with the prior orders of this Court is granted.

Submit order.

APPENDIX C

EASTERN CONFERENCE AUTOMOBILE TRANSPORTERS
JOINT COMMITTEE

Docket No. 437

IN THE MATTER OF THE DISPUTE BETWEEN

TEAMSTERS LOCAL #107, Philadelphia, Pa.
and
M & G CONVOY, INC.

Decision

HEARING: April 10, 1973 (Iron Hill Inn, Newark, Delaware)
DECISION: April 20, 1973 (Bethesda, Maryland)

The Committee held a hearing on April 10, 1973, at the Iron Hill Inn, Newark, Delaware, and heard evidence and arguments from all of the parties concerned. Thereafter, the Committee met on Friday, April 20, 1973, and after thoroughly reviewing the evidence produced in the four hearings, as well as the court proceedings, a motion was made duly seconded and carried as follows:

It is recognized that this fourth hearing is held pursuant to an Order by Judge Caleb M. Wright, dated March 2, 1973. Judge Wright enjoined the parties from giving any effect to the previous decision of the Committee, dated January 25, 1971. In remanding this case to the Committee, the Court noted three issues:

(1) The seniority rights of the plaintiffs as of the date of the absorption by M & G of Eastern's business in January 1964;

(2) The resolution of the question of fringe benefits for the plaintiffs who were former Eastern employees; and

(3) The question of damages.

In effect, the Court held that M & G did absorb Eastern. Accordingly, the seniority dispute must be resolved in the

light of that conclusion of the Court. In addition to the issues specified by the Court, there are also questions of whether the Committee's decision should apply to all former Eastern employees, and the effect of previous offers of employment.

In January 1964, M & G offered to dovetail all of the employees based on their terminal seniority, pending a decision of the Committee. The employees themselves strongly resisted this approach and the result was that M & G established one seniority list for its employees and one seniority list for the former Eastern employees until such time as the Committee ruled. Subsequent to the Committee decision, M & G hired certain of the Eastern employees as new employees, but this employment was not required by the Committee's decision. It is noted that in the original hearing the Eastern employees were not in favor of so-called dove tailing, but through their spokesman suggested that the Committee "flip a coin" to resolve the seniority issue.

At the hearing on April 10, 1973, the facts reveal that originally there were some 52 Eastern employees. Of this group, 24 were involved in the court action. Subsequently, five dropped out of the court case, an additional individual died, and one retired. Of the 17 indiivduals remaining, 12 were employed by M & G and five were employed elsewhere. The Bieski group argued that only the 19 remaining plaintiffs, including the one who died and the one who retired, should receive any benefits from the Committee on the grounds that all other employees lost their rights by not pursuing the lawsuit. M & G agreed with this position of the Bieski group, but noted that it had actually hired 22 Eastern employees. Several of the Eastern employees who were not involved in the litigation testified that it would be unfair for the Committee to treat them differently than the Bieski group. The Committee concludes that the fairest approach is to treat all Eastern employees in the same manner for the purposes of seniority and hiring; however, for pur-

poses of damages, including pensions, only the plaintiffs shall be entitled to any relief.

M & G presented evidence that pursuant to the Committee's decision on January 25, 1971, it offered employment to all Eastern employees who were not employed by M & G. Accordingly, M & G contends that it has no further obligation to the Eastern employees who rejected the offer of employment. The problem with this argument is that the Eastern employees may have rejected employment because their seniority rights were inferior to their former fellow employees who were working for M & G since 1964. Accordingly, the Committee concludes that in order to avoid any further confusion or speculation, M & G shall be required to offer employment to all former Eastern employees, except that M & G will not be required to offer employment to any Eastern employee who terminated employment with M & G for reasons such as a voluntary quit, retirement, discharge for cause, promotion out of the bargaining unit, or death.

Various contentions were made concerning the issue of seniority. The Bieski group argued that the court decision required dovetailing, and that dovetailing can only mean that both groups of employees must be credited with their total years of seniority with both companies. The Bieski group suggested that this meant integrating the two seniority lists based on over all seniority with both companies, or slotting the men in on a one for one basis. The Committee has read the transcript of the proceeding before Judge Wright, together with the Court's decision, and is convinced that the reference to dovetailing by the Court does not in any way restrict the decision of the Committee or deprive the Committee of the power to make its decision based on all of the facts.

The collective bargaining agreement made no reference to the seniority application. Further, there was no precedent under this contract for how the employees of an

absorbed company should be treated. Mr. Bottone of Local 107 contended, as did his predecessor, Mr. Cassidy, that the employees should be dovetailed in accordance with their over all seniority with both companies. Cassidy admitted that there was no consistent practice in the freight industry in the area, and he cited several examples where the employees went to the bottom of the seniority list in the freight industry. The Committee takes note of the fact that in addition to the testimony, the many court cases involving the Philadelphia area and vicinity reveal that in absorptions or purchases the purchased company's employees went to the bottom of the purchasing company's seniority list. This practice continued with some exceptions until 1969, when, for the first time, the employers and unions in the freight industry agreed on a policy of dovetailing based on over all seniority.

In the car haul industry, the only case referred to prior to 1964 in which there was dovetailing based on over all seniority was the M & G purchase of Great Lakes. That case arose in Buffalo, and was decided under another contract in the Central States area. In that case, the employees were dovetailed based on over all seniority in the circumstances where M & G bought the Great Lakes Company. M & G argues that it never bought Eastern and that even under the present 1973 contract the employees would go to the bottom of the seniority list.

In this case there was a good deal of argument presented by the various employees as to how the seniority resolution should be handled by the Committee. The M & G employees argued that they should not be penalized because Eastern went out of business. Based on all of the evidence, and under all of the circumstances, the Committee decides that the Eastern employees shall go to the bottom of M & G's seniority list as of January 1964, when M & G hired the first Eastern employees. The relative seniority of the former Eastern employees shall be based upon their position

on the Eastern seniority list. All of the former Eastern employees who are employed by M & G shall be placed ahead of new hires, that is, employees who never worked for Eastern and were hired on or after January 1964 by M & G. The former Eastern employees who are or become regular bona fide employees of M & G shall have seniority with M & G as of January 1964 for all purposes, except vacations. These Eastern employees will be credited with the seniority they enjoyed at Eastern in 1964 for future vacation benefits.

For purposes of pensions, M & G shall be responsible for insuring that any of the plaintiffs in its employ, or whom it shall employ pursuant to this decision, shall be credited for all time between January 1964 to date as if he had in fact been employed by M & G. The purpose of this crediting is to insure that these plaintiffs receive continuity of employment for purposes of pension credits. This requirement shall not require M & G to credit any of the plaintiffs for time involved after his employment has been terminated for such reasons as voluntary quit, retirement, discharge for cause, promotion out of the bargaining unit or death.

The question of damages is a difficult one. The Committee is impressed by the fact that M & G has complied with each and every decision of the Committee since 1964. M & G was not opposed to dovetailing the Eastern employees into the M & G seniority list. However, the Committee decision in 1964 did not require such hiring or dovetailing. The Committee finds that M & G acted in good faith and not in derogation of its obligation under the contract. Accordingly, the Committee determines that M & G shall not be liable for back pay or any other damages, except to the extent specified above, provided that it rearranges its seniority list in accordance with this decision and offers employment to Eastern employees based on this decision. Said offer by M & G shall be made in writing within two weeks of this decision, and the individuals involved shall be given two weeks to report for work.

In summary, the Committee concludes that:

(1) All former Eastern employees shall be treated alike, except for the issue of damages;

(2) M & G must offer employment to Eastern employees who were not employed by M & G;

(3) The Eastern employees employed shall go to the bottom of the M & G seniority list as of January 1964, when M & G first hired Eastern employees, but ahead of new hires who were hired after January 1964;

(4) All Eastern employees who are or become employees of M & G shall retain their Eastern seniority for future vacation benefits;

(5) The 19 Eastern employees, who are plaintiffs in the present case and who are or become bona fide employees of M & G, shall receive credit for pension benefits as if they had been employed by M & G;

(6) No employee shall receive any back pay or damages, except as specified above.

Any alleged violation or question of interpretation of this decision shall be subject to further review by this Committee.

Dated this 20th day of April 1973.

APPENDIX D

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT.

LAWRENCE E. BIESKI ET AL.

v.

EASTERN AUTOMOBILE FORWARDING COMPANY, INC., M & G Convoy, Inc., and Highway Truck Drivers and Helpers, Local 107, an Unincorporated Association Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Eastern Conference Automobile Transporters Joint Committee

and

Joseph A. Socklosky, Adam Dorosky and William Greenly, Acting on Their Own Behalf and on Behalf of Approximately Eighty-one Other Drivers Presently Employed by M & G Convoy, Inc., Intervenors

LAWRENCE E. BIESKI ET AL., Appellants.

No. 16954.

Argued March 7, 1968.

Decided May 29, 1968.

Rehearing Denied June 27, 1968.

Opinion of the Court

* * * * *

VAN DUSEN, Circuit Judge.

[1] This appeal is from an order of the District Court granting the defendants-appellees' motion for summary judgment. The underlying controversy in this case concerns certain seniority rights under a collectively-bargained labor agreement. There being substantial allegations that the seniority right, if any, arise from such a contract and that

recourse may lie for an alleged breach of the contract, the court has jurisdiction under § 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), authorizing District Court jurisdiction of suits for "violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." Humphrey v. Moore, 375 U.S. 335, 341-444, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964); Chasis v. Progress Manufacturing Company, 382 F.2d 773 (3rd Cir. 1967).

The 20 appellants, part of 24 plaintiffs below,[1] were formerly employed by Eastern Automobile Forwarding Company, Inc. (Eastern) a trucking company in the business of hauling new automobiles from the Chrysler Corporation assembly plant in Newark, Delaware. In January 1964, Eastern sold certain of its assets to M & G Convoy, Inc. (M & G), a similar company also hauling Chrysler's automobiles from the Delaware plant. The written agreement of sale provided for M & G to buy Eastern's real estate (two terminal properties) and substantially all of its operating equipment (mainly trucks). By the terms of this instrument, nothing else was transferred, neither goodwill, licenses, accounts receivable, liabilities, cash, nor I.C.C. operating certificate. After the sale, Eastern went out of business.

The appellants, Eastern drivers, finding themselves without employment, contend that they should have been hired by M & G on a basis that allowed them to keep their seniority gained while working for Eastern. They base this contention upon a multi-employer, multi-union, and multi-plant collective bargaining agreement: the Eastern Conference Area Truckaway and Driveaway Agreement (Agreement). The sections of this Agreement that possibly are relevant to this dispute concern seniority and grievance machinery. Article IV, "Seniority," provides in Section 1 that "term-

[1] The suit was originally a class action but was amended prior to the final hearing for a permanent injunction.

inal seniority will be maintained in accordance with the terms of this Agreement." Then, after the listing of seniority classifications, rules, and notice requirements, Section 3 concludes: "Any controversy over the seniority standing of any employee on the Seniority List shall be submitted to the Grievance procedure (Article 6)." Section 4, "Sale, Transfer, Etc.", provides that the Agreement would be binding on any successors or assigns of parties signing the Agreement and that any "purchaser, transferee, lessee, assignee, etc." of "an entire operation, or any part thereof," had to receive notice of the existence of the Agreement. Section 5, "Mergers, Etc.", provides:

> "In the event that the Employer absorbs the business of another private contract or common carrier or is a party to a merger of lines the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the grievance procedure (Article 6)."

Article 6, the "Grievance Machinery," provides that if "disputes and grievances" could not be settled by shop stewards or between local Union business agents and the company, then the dispute should go before a Joint Committee. This Committee, composed of equal numbers of representatives of unions and employers who were parties to the Agreement, was empowered to hear evidence and investigate the facts of a dispute; a decision by a majority was declared "[illegible] and binding on all the parties involved" (Section 3). Section 5 of Article 6 provides for final and binding arbitration if the Joint Committee is deadlocked, and Section 6, "Disputes and Requests for Interpretation," concludes that Article:

> "Unless otherwise expressly provided in this Agreement, any and all disputes, including interpretations of contract provisions, arising under, out, in connection with, or in relation to this collective bargaining agree-

ment shall be subject to the grievance procedure of the Agreement."

[2] Of the unions party to this Agreement, Local 107 [2] represented both the Eastern drivers and those at M & G. Consequently, one group of Union members, appellants here, wanted to be hired at M & G without losing all of their seniority by means of some form of "dovetailing;" [3] the other group of members of the same Local, M & G drivers, did not want to be pushed down their own seniority ladder and insisted that any transferring Eastern drivers go to the "bottom of the board." All parties concerned with this dispute seemed to agree at the outset that Article 4, Section 5, of the Agreement controlled and that the best road to decision was appeal to the Joint Committee. In the interim, the two groups of drivers, Local 107's business agent, and M & G agreed on the temporary solution of separate seniority lists for deliveries to the remaining pre-sale Eastern and pre-sale M & G dealers.

In the eyes of all parties, the seniority dispute turned on the application of Article IV to the terms of the business

---

[2] Highway Truck Drivers and Helpers, Local 107, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[3] "Dovetailing" is a labor relations term referring to some system of unifying, on one "board," two previously separate seniority lists. An unlimited number of variations are possible when two groups are combined and at least three general types have been mentioned in this case: (1) "Strict dovetailing," in which the senior man at M & G is followed by the senior man at Eastern, then the second man at M & G and so forth; (2) "sandwiching," a ratio concept, where, after Eastern drivers are compared to M & G's and the ratio determined, the new list might have the senior man at Eastern followed by the first two men at M & G, then the second at Eastern followed by the third and fourth at M & G, and so forth; and (3) "separate boards," not really a type of "dovetailing," in which separate seniority lists are kept for former Eastern routes and dealers and for M & G's routes and dealers.

eal between Eastern and M & G.[4] Before the sale, M & G nd Eastern (both common carriers with geographically co-xtensive I.C.C. operating rights) hauled cars from Dela-are, each to its own group of dealers. Eastern hauled to ew Jersey and parts of New York; M & G hauled to parts Pennsylvania, parts of New England, and parts of New ork not served by Eastern. This division of territory could ot be subject to a written agreement under I.C.C. regula-ons; it was established and enforced by Chrysler on an ral basis. In 1963, Chrysler informed Eastern and M & G nat increased railroad shipping would reduce the business vailable to the truckers. This prompted Eastern's presi-ent and sole shareholder to leave the business and, accord-ngly, he sought a deal with M & G—one firm, but not two, ould profitably survive in the face of the railroad competi-on. The record reveals that there was a meeting between hrysler's Traffic Manager and the presidents of both I & G and Eastern. No one attending that meeting has estified or deposed that an explicit oral agreement was eached that when Eastern sold certain of its assets and vent out of business, Chrysler would give to M & G the ormer Eastern customers. The president of Eastern said hat Chrysler agreed to deliver cars to Eastern up until he day of the sale and that he "nautrally supposed they M & G] would [get Eastern's former business] if they ought the Company [Eastern]." The District Court prop-rly found that "as of January 15, 1964, all cars formerly ransported by Eastern were handled by M & G * * *." 231 F. Supp. 710, at 712.

---

[4] Also, it is noted that the mintues of the Joint Committee meeting of January 23, 1964, state in the first paragraph:

> "The issue involved in this Case is the [sic] Union (Local 107) has requested an interpretation of Article 4, Section 5, of Truckaway Agreement, due to the fact of M & G Convoy Company buying out Eastern Auto Forwarding Company. This will involve a problem of seniority status."

At the hearing before the Joint Committee, various Eastern and M & G employees apparently[5] attempted to give their opinion of whether the sale of Eastern real estate and operating equipment was nonetheless an "absorption of business" within Article 4, Section 5, of the Agreement. Local 107's business agent apparently took no argumentative position on the absorption question and merely outlined factually the events of the sale and the M & G drivers' refusal to agree to any dovetailing. M & G's president pointed out that M & G did not buy any I.C.C. rights, capital stock, assets, or liabilities from Eastern other than two of three parcels of real estate and 99% of Eastern's tractors and trailers. He "reiterated that he did not buy any I.C.C. rights from Eastern * * *" No one pointed out that the purchase of such I.C.C. rights would have been illegal and, hence, such reiteration had no significance.[6]

A unanimous decision of the Joint Committee followed, ruling that "there was no corporate *acquisition, purchase, or merger* within the meaning of Article 4, *Section 4 and 5*" [emphasis added] of the Agreement, and, therefore, M & G had no duty under the Agreement to recognize the seniority requests of former Eastern drivers. Dissatisfied with this ruling, certain of the present appellants instituted a class action in the District Court, seeking a preliminary injunction to prevent any effect being given to the Joint Committee's decision. They further asked for a court decision under

---

[5] No transcript was kept of the Joint Committee meeting. The record contains summarizing "minutes" of what transpired, plus testimony before the District Court of Various people's recollection of what was said and the accuracy of the "minutes."

[6] It is noted that the Joint Committee chairman, a lawyer who was competent to point out the insignificance of no transfer of I.C.C. rights, remained silent as far as the minutes show. This lawyer's client, M & G, had a financial interest in a finding of no "absorption" under the terms of Article 4, Section 5; see footnote 15, infra.

301(a) of the L.M.R.A. that "dovetailing" should be re-
ired under the contract and that the Eastern employees
rrently denied such dovetailing were entitled to damages
r lost wages. After a lengthy hearing, the District Court
nied any preliminary injunction, Bieski v. Eastern Auto-
obile Forwarding Company, 231 F.Supp. 710 (D.Del.
964), and we affirmed his exercise of discretion, expressly
fraining from giving any opinion on the merits, 354 F.2d
4 (3rd Cir. 1965). During the pendency of this earlier ap-
al, Local 107 changed its counsel and, also changing its
neutral" position taken before the Joint Committee, urged
to reverse the District Court.[7]

On the hearing for a permanent injunction, the appellants
troduced as additional evidence only an affidavit of the
anagement lawyer who headed the Joint Committee the
y of the hearing,[8] and the present appeal is from an order
anting the defendants' cross-motion for summary judg-
ent.[9]

---

[7] Local 107's change of position prompted the reargument held
the first appeal.

[8] This affidavit, held irrelevant to the decision by the District
urt, showed that the Committee co-chairman presiding at the
aring, Carney D. Matheson, was also a lawyer for both Eastern
d M & G. The Joint Committee Rules show that his presiding
as according to Rule 4, which provided that the Union and em-
oyer co-chairmen would alternate as Acting Chairman at each
eeting. The affidavit also showed that Mr. Matheson also pre-
ler over the Joint Committee whose decision was later challenged
asuccessfully in Humphrey v. Moore, supra.

[9] After our affirmance of the denial of a preliminary injunction,
e District Court allowed representatives of the M & G em-
oyees and the Joint Committee to intervene as parties defendant.
he District Court, in granting summary judgment for the de-
ndants-appellees, decreed "it appropriate to do no more than
affirm its opinion of July 16, 1964, as reported at 231 F.Supp.
0, adopting the facts and conclusions of that opinion, and incor-
rating them by refeernce herein."

The precise question presented on the "merits" of this action is whether the Federal Courts can reverse the decision of a Joint Committee which has acted pursuant to a labor agreement, one section of which declared that the Joint Committee's decision would be "final and binding." On this record and in light of the recent Supreme Court decision in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), we affirm the conclusion of the District Court that the appellants failed to show a breach of the duty of fair representation sufficient to allow the courts to interfere on that basis with the agreed-upon private determination of a labor dispute. Such a conclusion, however, does not dispose of the matter.

The Supreme Court decision in Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363 (1964), dealt with a dispute closely analogous to the one at bar. In that case, the Joint Committee had determined a seniority "sandwiching" under a labor agreement almost identical to the Agreement in the present case. The Kentucky Court of Appeals, reversing the state court's denial of an injunction, granted a permanent injunction against giving any effect to the Joint Committee's decision and the Supreme Court reversed, holding that the dissatisfied employees seeking the restraint of the Joint Committee decision had not proved their case:

> "The decision of the committee, reached after proceedings adequate under the agreement, is final and binding upon the parties, just as the contract says it is. General Drivers, etc., Union v. Riss & Co., 372 U.S. 517, 83 S.Ct. 789, 9 L.Ed.2d 918." 375 U.S. at 351, 84 S.Ct. at 372.

Humphrey v. Moore, therefore, presents the obverse situation to the case at bar. But the approach of the Supreme Court in reversing the Kentucky court offers guidelines for our decision.

I.

[3] Under present Supreme Court decisions, the prominent labor policy of encouraging private settlement of disputes militates against court review of such private deci-

ons except in the narrowest of circumstances.[10] The appel-
nts argue that the present case falls outside the general
ıle of these cases prohibiting court review absent fraud
nd deceit. (This was the standard used by the District
ourt. 231 F.Supp. at 716.) The "fraud and deceit" stand-
rd, they argue, is proper only in "arbitration" cases. As
uthority they cite Humphrey v. Moore, 375 U.S. at 345-
48, 84 S.Ct. 363, where the Joint Committee's decision
as found "reasonably concluded" and "neither unique
or arbitrary." Appellants also point out that the "arbitra-
on" cases [11] were not cited in Humphrey v. Moore and
rgue that the omission is significant.

[4] We do not think that such a conceptual distinction
etween court review of arbitration and committee deci-
ions is necessarily appropriate under federal labor law.
Rather, with the specific labor agreement as a necessary
tarting point, the question of judicial review of a "final"
rivate decision should turn on the adequacy of that private
ecision under the contract in terms of the controversy pre-
ented.[12] If the court is convinced both that the contract
rocedure was intended to cover the dispute and, in addi-
ion, that the intended procedure was adequate to provide a
air and informed decision, then review of the merits of any
ecision should be limited to cases of fraud, deceit, or in-
tances of unions in breach of their duty of fair representa-
ion.

---

[10] United Steelworkers of America v. American Mfg. Co., 363 U.S. 574, 578, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 93, 596, 80 S.Ct. 1358, 4 I.Ed.2d 424 (1960); General Drivers, tc., Union v. Riss & Co., 372 U.S. 517, 519, 83 S.Ct. 789, 9 L.Ed.2d 18 (1963); Republic Steel Corp. v. Maddox, 379 U.S. 650, 653, 5 S.Ct. 614, 13 L.Ed.2d 580 (1965).

[11] See the *Steelworkers* "trilogy," ibid.

[12] See Rothlein v. Armour & Company, Inc., 391 F.2d 574 (3rd Cir., 3/26/68).

If, however, the private decision complained of is a "jurisdictional" one—that a certain dispute will not be considered on its merits by the private decision-maker—then the court is a proper forum to review this decision on the basis of its analysis of the contract entered into by the parties. John Wiley & Sons v. Livingston, 376 U.S. 543, 546-547, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). This is particularly true where the court is convinced that a private procedure used for the determination is not adequate to decide fairly and fully such an important initial question. Rothlein v. Armour & Company, Inc., supra.

II.

Turning thus to the Agreement, the central question is what provisions govern this seniority dispute. The Supreme Court in Humphrey v. Moore raised this precise problem of the contractual authority for the Joint Committee's decision, but never decided the dispute over this issue since, in their view, regardless of the section applicable, the Committee's decision was reasonable. In this case, this problem of authority is hotly contested.

The appellants argue that any authority given to the Joint Committee must be found in Article 4, Section 5. If there is an absorption, the Joint Committee has jurisdiction of the merits. The Committee found that it had no jurisdiction to proceed further when it found no absorption. Under this view, it is concluded, the Joint Committee decision being "jurisdictional," that the courts may grant full, broad review of the decision. The Supreme Court, in Humphrey v. Moore, 375 U.S. at 345-346, 84 S.Ct. 370, fn. 8, in dealing with the Committee's "power" to decide that a transfer of operating authority was an "absorption," supported this view in saying that a section closely similar to Article 4, Section 5, of the Agreement in this case,

> "* * * by its own terms appears to limit the authority of the committee to disputes over seniority in the event of

an absorption. Reconciliation of these two provisions, going to the power of the committee under the contract, itself presented an issue ultimately for the court, not the committee, to decide."

The appellees, on the other hand, maintain that the District Court was correct in concluding that Article 6, Section 6, was the sole source of the Joint Committee's authority in the first sentence (231 F.Supp. at 715), as this was a dispute over contract interpretation within the intent of that section. This theory leads to the conclusion that the Agreement, having specified a private body to make contract interpretations (whether there was an absorption), the Joint Committee's interpretation can be attacked only by a showing of fraud or deceit.

[5] As we read the several contract provisions outlined above and consider them as part of an entire agreement, we think the appellants are substantially correct. Under Article 4, Sections 1-3 seem concerned with seniority disputes between employees and employer within the setting of a continuing industrial relationship: controversies over the layoff, sick leave, or recall provisions. Section 4 addresses itself to the Union's problems of maintaining seniority for its members when the employer sells his business to another or attempts to lease part of the operation to another. The buyer or transferee may not be unionized or may have his own seniority system, and this section seeks to bind the employer-seller or transferor to make the assumption of the collective agreement a term of the sale, transfer or lease. Such would vastly assist the Union's position with the new employer. In the present case, Eastern falls within the scope of this section as a seller. It might have been argued that M & G, also a party to the multi-employer agreement, was bound to Section 4 as an implied term of its purchase and, accordingly, had agreed to honor the Eastern seniority. Presumably that is why the Joint Committee's decision

held this section inapplicable despite the singular focus of the hearing and arguments on Section 5.

Section 5 appears as an effort of the unions to hedge or protect themselves against another union with rights similar to those in Section 4. Section 5, since another labor agreement including its seniority provisions might be made a term of any absorption, merger, etc., seeks to remove at least seniority from any such deal and provide instead that seniority will not be settled by the employers alone but between the unions and the surviving employer. With due attention for the scheme of this contract and the explicit reference in Section 5 to the Article 6 grievance procedure, the contract seems to contemplate that after the business deal, resort will then be had to the grievance machinery (Joint Committee) to resolve any lack of "mutual agreement" on a post-absorption seniority matter. As noted above at pp. 5-6, the parties considered the possible application of Article 4, Section 5, as the "issue involved" (see footnote 4). Since Article 4 appears within the entire contract as the Article governing all seniority problems,[12a] its application to the dispute through a finding of "absorption" is an important consideration even though Article 6, Section 6, also might apply if Article 4, Section 5 (containing the specific language for seniority matters) was to be subordinate to Section 6's general language. Section 5 refers to an industrial solution to be reached by the "*Unions* involved." In some situations one (or more) of those Unions would not be a party to the employer's agreement and, therefore, would not be bound by Section 5 to look to the Joint Committee to solve the seniority dispute by interpret-

---

[12a] For example, Article 4 provides for terminal seniority and in Section 3 states: "A list of the employees arranged in the order of their seniority shall be posted in a conspicuous place at each respective terminal." The dispute should be resolved with consideration of such language as background policy, although the merits decision is solely for the Joint Committee.

ing the contract.[13] Accordingly, we conclude that the Joint Committee on this record should have proceeded under Article 4, Section 5, to determine the controversy with respect to seniority.

III.

The complicating factor in this case is that the same Union represents both groups of employees. This places the Union in a severe dilemma. If they take one side, they jeopardize their position as Union for the employees of the surviving company, M & G. If they take the other, they may jeopardize their relationship as representative of other units of employees, some of whom may in the near future seek seniority "dovetailing" at a strange plant. Local 107's attempt to be "neutral" before the Joint Committee and their subsequent change on the first appeal to advocacy of the appellants' position does not show bad faith any more than it shows breach of its duty of fair representation. Neutrality may have been the only practical position to take before the Joint Committee and the subsequent change of position may be an attempt to save their relationship at other plants, since court reversal of such Committee's decision can occur only in limited circumstances.

Nonetheless, the private decision process under this Agreement contemplates an adversary proceeding with an effective conflict of positions over a seniority dispute, "effective" meaning opposition between parties having some voice in the decision of the Joint Committee. This essential opposition was lacking in this case and calls into doubt the reasonableness of the Joint Committee's decision regardless of which contract provision empowered the determination. If Local 107 was genuinely neutral, the management

[13] In this situation, if the employer follows any seniority request of the non-party union, the objecting union, party to the Agreement, would take its lack of "mutual agreement" with the employer to the Joint Committee.

half of the Joint Committee was most probably not.[14] The would probably increase such seniority),[15] the more M & G more total seniority its employees had (and "dovetailing" would have to pay in certain seniority-based fringe benefits. Moreover, although Joint Committee Chairman Matheson and his firm represented both M & G and Eastern, with only M & G surviving, it is unrealistic to regard him as so neutral in a labor controversy such as the one at bar that he would argue against the M & G president (his client) in bringing out any legal matters that would depreciate the force of his client's contentions. Consequently, the cause of the Eastern employees had, practically, an extremely small chance of success; no decision-maker with any power would take their side. The Supreme Court observed in Humphrey v. Moore that the complaining employees did not suggest any additional facts or theory which could have been added if they had been differently represented. But in Humphrey v. Moore, unlike the present case, of the two employers involved, neither had gone out of business as has Eastern.[16] Accordingly, the management vote in Humphrey v. Moore had a substantial chance of not being unified and the arguments of each group of employees had a substantial chance

---

[14] We think it a fair assumption on this record and in light of the contractual scheme of the grievance machinery that the two halves of the Committee would vote along union-management lines if each took a different position.

[15] An affidavit of Charles Weed, M & G's terminal manager, makes clear that higher seniority-keyed costs, as well as a concern for present employee relationships, caused M & G to oppose any dovetailing of Eastern drivers' rights. There was also apparently some minor dispute attendant to the seniority controversy concerning the status of Eastern drivers as employees or "brokers" (owner-operators). This additional factor complicates any system of logical dovetailing.

[16] Humphrey v. Moore, supra, involved two companies who responded to the reduced business by redividing their geographic territories on a more efficient basis.

of being forcefully and competently presented and genuinely considered regardless of the Union's position.[17]

[6] For the above reasons, we think the "jurisdictional" decision of the Joint Committee must be rigorously scrutinized for reasonableness. Contrary to the Supreme Court observation in Humphrey v. Moore, 375 U.S. at 351, 84 S.Ct. at 372, on this record we definitely cannot say it is "idle speculation to assume that the result would have been different had the matter been differently presented." The argument for there having been an absorption of business in this case was made only by employees and their shop stewards. They were opposed by the arguments and unanimous vote of experienced businessmen, lawyers, and professional union agents.

[7] As outlined above, under the Agreement in this case, the consideration of "absorption" was a jurisdictional decision in the Joint Committee's opinion. In the event M & G absorbed the business of Eastern, then the Joint Committee could solve the "merits" of a seniority dispute submitted to it under the last sentence of Article 4, Section 5. The decision that there was no absorption meant that M & G could determine seniority as it wanted with respect to the Eastern employees;[18] it was not a seniority problem open

---

[17] The Local in Humphrey v. Moore also changed its position during the course of dispute, only there the Local changed from advocating "bottom of the board" to "dovetailing" before the Joint Committee rendered its decision. The Union's dilemma was probably more acute in Humphrey v. Moore because the "absorbed" employer continued in business in other areas.

[18] Under the scheme of this Agreement and the 1964 Joint Committee decision, if M & G were to accede to any demands of the Eastern drivers, the M & G drivers would possibly have a dispute under Article 4, Sections 1-3, for breach of their seniority rights. Eastern drivers, however, not employed by M & G and excluded from any Section 5 rights, could only hope for redress by means of a dispute with their old employer, Eastern, through Article 4, Section 4, and only through Eastern would M & G possibly be affected.

for "mutual agreement," the lack of which agreement could then be taken to the Joint Committee. Under federal labor law, we think that this "jurisdictional" question is a proper one for the courts, just as it would be if the question before us were whether or not a given dispute should go to arbitration.[19] And under the standard of Humphrey v. Moore, 375 U.S. at 345-347, 84 S.Ct. 363, we think the decision of the Joint Committee was unreasonable and arbitrary. Moreover, since the adequacy of the proceedings before the Joint Committee was not commensurate with the importance of the "absorption" question presented, the court should scrutinize fully the "jurisdictional" application of Article 4, Section 5. Rothlein v. Armour & Company, Inc., supra.

We think that the present record shows M & G absorbed the business of Eastern. The contrary argument, based on a characterization of the Agreement as solely a sale of certain specific assets, is an attempt to make the form of a certain commercial and legal transaction govern all the consequences under federal labor law. This is both unsound and illogical. M & G's purchase was not the equivalent of a purchase of land from a real estate broker and trucks from a dealer. Why, in the face of a significant reduction in business from Chrysler, would M & G buy such a large amount of equipment?

The present record amply demonstrated the oral basis of Chrysler's territory allocation. Chrysler was kept fully informed of the proposed sale from the outset and the presidents of Eastern and M & G met with the Chrysler traffic manager to discuss the sale. Although no testimony proves a specific agreement between Chrysler and M & G to transfer the Eastern business, Eastern's president deposed that he naturally supposed M & G would get Eastern's business if they bought the company. This supposition is important,

---

[19] See John Wiley & Sons v. Livingston, supra; the *Steelworkers* "triology," supra, footnote 10; Humphrey v. Moore, supra, at 345-346, 84 S.Ct. 363, footnote 8.

not because it proves an actual transfer or oral assignment of Eastern's business to M & G, but because it shows that the parties entered the assets sale thinking that M & G would service the remaining Eastern dealers not serviced by new railroad deliveries. And after the sale, for whatever reason, this supposed development in fact happened; pending the Joint Committee's decision the appellants continued to deliver to old Eastern dealers for M & G (see finding of District Court, 231 F.Supp. at 712).

In derogation of this showing that M & G "in fact" absorbed some of Eastern's business, M & G and Local 107 pointed to the naked terms of the asset sale agreement and the lack of any transfer or purchase of I.C.C. rights, assets, liabilities or capital stock. In light of the general nature of the phrase "absorbs the business" and the showing that such "business" was based on an oral understanding with Chrysler, not a contract subject to formal transfer, we think that the Joint Committee's decision was unreasonable. The lack of transfer of any I.C.C. rights was totally irrelevant: M & G already had coextensive I.C.C. rights to those of Eastern and the I.C.C. prohibited one carrier from having dual rights to the same geographic area.

The Joint Committee's decision ruled that "there was no corporate acquisition, purchase, or merger within the meaning of Article 4, Section 4 and 5." But this does not preclude the "absorption of business" which, from our reading of the contract, was intended by the drafters of the Agreement to cover transactions that did not fit any recognized legal pigeonhole. Very specific legal phrases were used when necessary—sale, transfer, assignment, lease, merger, etc. But in Article 4, Section 5, the drafters first mentioned the general word "absorbs" followed later by "or * * * merger of lines." "Absorbs" must refer to something different than "merger" and a reading of the entire section shows that "absorbs" was used in an expansive and general sense.

[8] Our decision that the Joint Committee's ruling was unreasonable does not finally solve this dispute. We merely rule that on this record, this seniority controversy should proceed within Article 4 of the Agreement. Having thus exercised our proper judicial function, we return this dispute to the agreed-upon private method of decision. This course is dictated both by the overriding federal labor policy of encouraging private resolution of disputes [20] and by the extremely complicated problems raised in any form of "dovetailing." On this record, the "merits" of this dispute are open to many rational solutions; the parties involved should have the first chance to offer a plan.

Although we are aware that considerable time has passed and significant changes may have taken place in the labor relations of Local 107 and M & G, such considerations would have their proper effect in deciding which of a great many possible seniority solutions is best in this situation. We are confident that the federal labor policy of encouraging responsible private solution of disputes will be advanced in this instance, since Local 107's change of position will distinctly improve the chance of competent and complete presentation of the appellants' contentions and will guarantee a proceeding more adequate under the terms of this Agreement. Moreover, the chance of "deadlocking" the Joint Committee and thus securing arbitration of the dispute is, for the first time, also a distinctly possible alternative. Should the Union again reverse its position to one of neutrality, it ought to make that neutrality genuine by either deadlocking the Joint Committee or, at the very least, seeing that the appellants' position is presented by experienced and competent representatives.[21]

---

[20] See, e.g., Republic Steel Corp. v. Maddox, supra.

[21] Such Union conduct would be particularly appropriate, for instance, if new evidence were added in some way which tended to show, despite the present record, a potentially reasonable basis for the Joint Committee's concluding no Article 4, Section 5, "absorption" had occurred in 1964. It would appear that there are

In order to give the chosen contractual scheme a chance to operate fairly and effectively in this complex dispute, (1) the order of the District Court will be reversed; and (2) the District Court will be directed to enter an appropriate order enjoining any party from giving any effect to the January 23, 1964, decision of the Eastern Conference Automobile Transporters Joint Committee. The District Court may decide to retain jurisdiction for purposes of carrying out its injunction, without prejudice to the refiling of an amended complaint should private resolution under the Agreement of this seniority dispute be unavailable or otherwise illegal.

SEITZ, Circuit Judge (dissenting).

The district court decided that under the Collective Bargaining Agreement ("Agreement") the correctness of the Committee's ruling was not subject to judicial review in the absence of relevant fraud, deceitful action or dishonest conduct. Having found no such evidence, it dismissed the complaint. The majority apparently agree with the district court that there was no fraud, etc. in this matter. However, I infer from the majority opinion that the issue is seen as one going to the "jurisdiction" of the Committee to decide the particular grievance. So viewed, they test the Committee's decision by a standard of "reasonableness." I cannot agree that under the language of this Agreement the particular grievance issue decided by the Committee—whether the M & G—Eastern transaction involved a merger or absorption—was one going to its jurisdiction. The grievance raised a threshold problem of interpretation for the Committee but, in my view, that matter came quite clearly

other arguments which might well be advanced on behalf of appellants in further proceedings before the Joint Committee. For example, the possible binding effect of Article 4, Section 4, as to which the appellants would seem to be third-party beneficiaries, might be reconsidered. See p. 13, supra. It does not appear that any arguments directly on this point were made to the Joint Committee.

within the ambit of the substantive provisions of Article 6, Section 6:

> "Unless otherwise expressly provided in this Agreement, any and all disputes, including interpretations of contract provisions, arising under, out of, in connection with, or in relation to this collective bargaining agreement shall be subject to the grievance procedure of the Agreement."

The majority have apparently determined that the broad substantive provision of the quoted Article and Section are not applicable in deciding the Committee's right to make the ruling in dispute. They conclude that they are therefore entitled to test the ruling by a "reasonableness" rather than a "fraud" etc., standard. It is not clear to me how the majority are able to avoid the impact of the substantive provisions of Article 6, Section 6. In my view such provisions are applicable unless it can be said that Article IV, Section 5 (mergers, etc.) is a provision of the kind contemplated by the introductory language of Article 6, Section 6 ("Unless otherwise expressly provided in this Agreement * * *").

There is no doubt that the introductory language of Article 6, Section 6 imposes a limitation on the broad power otherwise conferred on the Committee by that Article and Section. But even if the issue be judged by a "reasonableness" standard, I am unable to find that the Article IV, Section 5 is a provision "otherwise expressly" applicable. Article 6 is headed "Grievance Machinery." The sections thereunder concern themselves solely with the various steps to be taken in processing a grievance. In this setting it seems fair to say that the clause "Unless otherwise expressly provided in this Agreement," refers solely to other provisions of the Agreement which either remove particular grievances, in whole or in part, from the operation of Article 6 or set forth different procedures to cover them.

I think the reasonableness of the foregoing interpretation is supported by an examination of the entire Agree-

ment. For example Article 8, headed "No Strikes or Lockouts," deals first with those matters which are to be settled by the Committee, and then reads:

> "* * * except for the following direct violations, which are indisputable:
>
> 1. Non-payment of the established rates provided in Article 20, Section 2, 4(a) and (b).
> 2. Non-payment of health and welfare contributions as provided for in this Agreement.
> 3. Non-payment of pension contributions as provided for in this Agreement."

The quoted language seems to me to remove that particular subject matter from the operation of Article 6.

Article 9(A), Section 3 and Article 9(B), Section 3, dealing with "Protection of Rights" of employees, both explicitly provide that in processing grievances, the parties may proceed to the Committee "without taking any intermediate steps, any other provisions [in one case 'provision'] of this Agreement to the contrary notwithstanding." The last paragraph of Article 30, Section 2 also contains provisions at variance with some of the mechanics of the grievance procedure set forth in Article 6.

Thus, there are several provisions in the Agreement which, in my opinion, are of the type contemplated by the introductory language of Article 6, Section 6. In contrast, I can find no language in Article IV, Section 5 which removes its subject matter from the operation of the Article 6, Section 6. Nor can I find in it any language which sets forth a procedure which differs from that provided by Article 6. Article IV, Section 5 recites that the Article 6 grievance procedure shall control such matter. One might ordinarily attribute significance to such a particular provision in order to avoid a finding that it serves no particular purpose. But a reading of the Agreement shows that similar language is found in at least 13 other provisions of the Agreement. Thus, the particular reference to Article 6 can-

not be accorded significance under the circumstances. Finally, I think the language of footnote 8 in Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363 (1954) is not applicable to the crucial issue in this case because the Supreme Court was not there concerned with an Agreement containing, inter alia, the crucial introductory language of Article 6, Section 6.

In reviewing the Committee's decision I think the Court was required to interpret the Agreement on the basis that the substantive provisions of Article 6, Section 6 were controlling. So viewed, the district court properly concluded that the correctness of the Committee's decision interpreting the Agreement in relation to the M & G—Eastern transaction was not subject to judicial review.

The parties to the Agreement have seen fit to give the Committee rather broad and conclusive power to interpret and apply it. The law, for the most part, honors such provisions. Obviously some grievance determinations will be made which courts will consider "wrong" or "unfair." I confess that such is my reaction to the merits of the Committee's decision here. But, with deference, the "risk" is inherent in according finality to non-judicial determinations.

I would affirm the district court.

APPENDIX E

Opinion

WRIGHT, Chief Judge.

This matter is before the Court on cross motions for summary judgment. The factual controversy is fully set forth in earlier opinions of this Court and of the Court of Appeals,[1] and it will not be reviewed here. The procedural posture requires, however, some elaboration.

---

[1] Bieski v. Eastern Automobile Forwarding Company, 231 F. Supp. 710 (D. Del. 1964), 354 F.2d 414 (3d Cir. 1965), 396 F.2d 32 (2d Cir. 1968).

This Court's opinion denying a temporary injunction, 231 F. Supp. 710 (D.Del. 1964), affirmed as an exercise of discretion, 354 F.2d 414 (3d Cir. 1965), was adopted and incorporated in the order granting summary judgment to defendants. The Court of Appeals reversed the judgment for defendants and remanded the case for further orders and proceedings by this Court. 396 F.2d 32 (3d Cir. 1968). Prior to issuance of the judgment (in lieu of mandate) by the Court of Appeals, the Joint Committee held a rehearing. Plaintiffs attack here, by supplemental complaint, the decision rendered July 18, 1968, upon the rehearing, as violative of the collective bargaining agreement and in contempt of the Court of Appeals' decision.

The Court of Appeals gave two bases for judicial review of the Joint Committee's decision: a procedure inadequate to insure full presentation of opposing interests, and failure at a threshold or jurisdictional level to consider the merits of a dispute committed by the contract to private resolution. In elaborating this dual predicate, the court stated:

> "If the court is convinced both that the contract procedure was intended to cover the dispute and, in addition, that the intended procedure was adequate to provide a fair and informed decision, then review of the merits of any decision should be limited to cases of fraud, deceit, or instances of unions in breach of their duty of fair representation.
>
> If, however, the private decision complained of is a 'jurisdictional' one—that a certain dispute will not be considered on its merits by the private decision-maker —then the court is a proper forum to review this decision on the basis of its analysis of the contract entered into by the parties. John Wiley & Sons v. Livingston, 376 U.S. 543, 546-547. This is particularly true where the court is convinced that a private procedure used for the determination is not adequate to decide fairly and fully such an important initial question. Rothlein v. Armour & Company, Inc., supra."
>
> 396 F.2d at 38.

The court determined that the Joint Committee's decision that "there was no corporate acquisition, purchase, or merger within the meaning of Article 4, Sections— 4 and 5" was "jurisdictional." That decision barred the Committee's consideration of the seniority controversy, because Article 4, Section 5[2] of the Eastern Conference Truckaway and Driveaway Agreement ("Agreement"), to which the unions and employers are adherents, requires an absorption to invoke its grievance procedure. The court also determined that the interests of the plaintiffs had not been adequately represented in the proceedings. With those two justifications, the court examined the Joint Committee's decision and found it to be unreasonable and arbitrary, stating that the Joint Committee "should have proceeded under Article 4, Section 5, to determine the controversy with respect to seniority." Id. at 39.

The question now before this Court is whether the decision of the Joint Committee, upon rehearing held before the Court of Appeals issued judgment, may once again be disturbed. Defendants argue that the limited right of review discussed by the court arises only upon a finding of inadequate representation *and* a determination that the decision is "jurisdictional." Since the procedural infirmities found were remedied in the rehearing, their position is that this Court may not review the decision, even though it be "jurisdictional." For the reasons stated below, the Court concludes that it has not only the authority but the duty to nullify the decision and to order the Joint Committee and the other defendants to proceed forthwith to the long overdue resolution of this controversy.

---

[2] Article 4, Section 5 reads as follows:

Section 5. *Mergers, Etc.*

In the event that the Employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the grievance procedure.

The Court of Appeals held that "the present record shows that M & G absorbed the business of Eastern." Id. at 41. It ruled that "on this record, this seniority controversy should proceed within Article 4 of the Agreement." Id. at 42. Whether or not the rehearing mooted the issues before the Court of Appeals by withdrawing the effect of the first Joint Committee decision, that court's interpretation of the law and its judgment on the record before it are binding here. In the absence of new evidence supporting a contrary conclusion,[3] the law of the case precluded a finding of no absorption and compelled the Joint Committee to proceed to the merits of the seniority controversy.

Even were this Court without guidance as to the specific transaction between Eastern and M & G, however, the decision rendered in this case is authority for its review.

The court above never stated the two bases it discussed in the conjunctive. It noted that the need for review was especially great when the procedure was not adequate to assure fair and full representation on "jurisdictional" questions, but it found ample authority to arise from the nature of the question alone.[4] Thus, this Court need not

---

[3] Footnote 21 of the opinion indicates that introduction of new evidence on the absorption issue was permissible and that reconsideration on the basis of that evidence was not precluded. 396 F. 2d at 42, n. 21.

[4] In addition to the passages quoted in the text, the Court of Appeals indicated the disjunctive nature of the jurisdictional prerequisites in the following language:

> ". . . we think that the 'jurisdictional' question is a proper one for the courts, just as it would be if the question before us were whether or not a given dispute should go to arbitration (citing John Wiley & Sons v. Livingston and the *Steelworkers* 'trilogy').
>
> . . . Moreover, since the adequacy of the proceedings before the Joint Committee was not commensurate with the importance of the 'absorption' question presented, the court should scrutinize fully the 'jurisdictional' application of Article 4, Section 5. Rothlein v. Armour & Company, Inc., 391 F.2d 574 (3d Cir. 1968)."

find inadequacies in presenting the interests of the M & G employees to review a Joint Committee decision that no absorption occurred. A finding of no absorption at the rehearing is no less subject to judicial scrutiny than was the first such finding.

On July 18, 1968, the Joint Committee again decided that M & G had no duty to recognize the seniority rights of former Eastern drivers, "since the facts and evidence submitted and presented this date show that there was no intent to corporate acquisition, merger or absorption within the meaning of said Article 4, Sections 4 and 5." Careful review of the proceedings held before the Joint Committee on July 17, 1968,[5] reveals no evidence presented which would reasonably and fairly warrant a finding that there was no absorption. The only new evidence consisted of decisions by the Joint Committee in similar cases and an affidavit that the former president of Eastern was not on the M & G board of directors, as had been previously represented. The opinions, of course, do not change the factual configuration of the transaction in question. The affidavit has only marginal significance.

Whether the Joint Committee misinterpreted the Court of Appeals' decision or attempted to avoid it, this Court has no alternative but to return the dispute and direct the Joint Committee to determine the seniority controversy on its merits. This course is dictated, as the Court of Appeals said, "both by the overriding federal labor policy of encouraging private resolution of disputes and by the extremely complicated problems raised in any form of 'dovetailing.'" Id. at 42. The controversy is certainly open to rational solution, and the Committee must undertake the task.

Defendants contend finally that plaintiffs have no standing to sue since there is no evidence of fraud, collusion,

---

[5] The record of the proceedings before the Joint Committee was presented to the Court by stipulation of the parties.

breach of the union's duty of fair representation, or of procedural infirmity. That contention is without merit. The Court of Appeals stated that a finding that no breach of the duty of fair representation occurred would not dispose of the matter. Id. at 37. Neither of the two bases it prescribed for review requires a showing of fraud or collusion. Judicial review is predicated on inadequacy "of the private decision in terms of the controversy presented." Id. at 37-38. See also Rothlein v. Armour & Company, Inc., 391 F.2d 574 (3d Cir. 1968). At any rate, the decision of the Court of Appeals that plaintiffs may maintain this action is binding on this Court and further inquiry is not necessary.

An order requiring defendants to comply with this decision within ninety days will be signed upon its presentation to the Court.

Wilmington, Delaware

July 9, 1970

VIII.

ORDER.

This matter having been presented to the Court upon cross-motions for summary judgment, and the Court having considered the briefs and argument of the parties and having filed its opinion on July 9, 1970, it is

ORDERED, that plaintiffs' motion for summary judgment is granted, and that the joint committee shall proceed within ninety days to determine the seniority controversy on its merits in accordance with this Court's opinion.

/s/ CALEB M. WRIGHT,

C. J.

DATED: August 7, 1970

APPENDIX F

Opinion and Order

WRIGHT, Chief Judge.

This matter is before the Court on the plaintiff's Petition for a Rule to Show Cause and For Other Relief brought against the defendant Eastern Conference Automobile Transporters Joint Committee (Joint Committee). The case has been before this Court and the Third Circuit Court of Appeals on numerous prior occasions and its legal and factual background has been set forth fully in the earlier opinions of both courts.[1] The issue raised in the present petition is whether the Joint Committee has complied with the order of this Court and the rulings of the Third Circuit in its resolution of the Eastern and M & G seniority dispute as set forth in its January 25, 1971 decision. The Court is of the opinion that it has not.

On July 9, 1970, the Court issued an opinion nullifying the Joint Committee's second decision that M & G had not absorbed Eastern and directed the Joint Committee to determine the merits of the seniority dispute. On January 7, 1971, after the defendants had failed to comply with the Court's order, the Court issued an order which read in pertinent part:

> 1. The defendants are enjoined from giving any effect to the Joint Committee's decisions of January 23, 1964 or July 17, 1968.
>
> 2. The Joint Committee is directed to promptly hear and decide the seniority rights of the individual plaintiffs based upon some form of dovetail of the seniority lists of the defendants Eastern and M & G as they existed at the time of the absorption of Eastern's business by the defendant M & G and to decide on its

---

[1] Bieski v. Eastern Automobile Forwarding Company, 231 F. Supp. 710 (D. Del. 1964); 354 F.2d 414 (3rd Cir. 1965); 396 F.2d 32 (3rd Cir. 1968).

merits the right of the individual plaintiffs to monetary damages.

3. This Court shall retain jurisdiction for the purpose of seeing that this order is appropriately complied with.

The Joint Committee held a hearing on the seniority issues on January 13, 1971 at which time the several parties were afforded the opportunity to present their respective positions on the issue. On January 25, 1971, the Joint Committee rendered the decision which is being challenged in the instant petition.

In its decision, after briefly setting the history and nature of the controversy, the Joint Committee discerned four categories of individuals whose seniority rights were in issue:

FIRST:

There are the employees of M & G who were working for this company prior to 1964 and who have employment rights which are superior and prior to any others.

SECOND:

There are the employees who sought and obtained employment with M & G in March 1964 and following who have accumulated approximately seven years of employment rights by active service for M & G.

THIRD:

There are the employees hired by M & G, who have worked for Eastern but who have accumulated varying years of employment rights since 1964.

FOURTH:

There are the former employees of Eastern who have never worked for M & G and whose employment rights arise solely because of the Court's decision.

Jt. Comm. Rpt. p. 1.

It then proceeded to determine these groups' seniority rights as follows:

> "In accommodating all of these various 'rights' it is recognized that there are not sufficient jobs to satisfy all of these claims and some of the claimants may achieve a place on an employment list with little or no chance for employment. This disappointment should be confined, as far as possible, to those who have worked the least for M & G and still recognize the employment rights ordered by the Court.
>
> "Accordingly, only at the direction of the Court and not based upon the collective bargaining obligation or based on past decisions of this Committee, which in the Committee's opinion were a correct reflection of the interest of the collective bargaining agreement in effect in 1964, the seniority list will be prepared in the following manner:
>
> 1. All employees of M & G who were on the list in January 1964.
> 2. All former Eastern employees who were hired by M & G in 1964 in order of their hire.
> 3. All former Eastern employees who have never worked for M & G in order of their seniority at Eastern.
> 4. All present employees of M & G hired after 1964 who never worked for Eastern. . . .
>
> The former Eastern employees being added to this list will have a March 1964 date for fringe benefits in the future, thus protecting their vacation rights as though they had come to work at that time. . . ."
>
> Jt. Comm. Rpt. pp. 1-2

Finally, the Joint Committee found that none of the individual plaintiffs were entitled to damages because M & G had followed its decisions.

> "No employees have suffered a loss because employment was not denied to any former Eastern employee who sought available work with M & G in accordance with the decision and collective bargaining in effect.

Furthermore, M & G complied with all decisions of the Committee and no damages would be awarded, even if same were suffered, because the company is obligated under the collective bargaining agreement to follow the decisions of this Committee. Where two men seek an available job and the employer assigns the work pursuant to a decision of this Committee, the employer cannot be held liable without seriously impairing the procedures, discipline and respect for this Committee's decisions."

Jt. Comm. Rpt. p. 2

The Court clearly ordered that the Joint Committee decide the seniority rights of the plaintiffs as of the date of the absorption of Eastern's business. This it has failed to do. The choice of the March 1964 date for future fringe benefits and the differentiation between those Eastern drivers who were employed by M & G after March 1964 and those Eastern drivers who have never worked for M & G clearly evidences that the Joint Committee considered matters subsequent to the date of pertinent inquiry.[2] The demarcation between two groups of Eastern drivers on the basis of occurrences after the absorption cannot be justified under the Court's order to determine the rights as of the date of the absorption. Contrary to the Joint Committee's repeated references that the plaintiffs' rights arose subsequent to the transaction and solely on the basis of court decisions, the seniority rights of the Eastern drivers arose from the Eastern Conference Area Truckaway and Driveaway Agreement (Agreement) as a result of and at the time of M & G's absorption of Eastern's business. The Third Circuit has clearly ruled that on the record such an absorption occurred within the meaning of the Agreement, 396 F.2d at 41, and that the Joint Committee must determine the seniority question under Article 4, Section 5 in light of the fact M & G absorbed Eastern's business. Since

[2] The defendants' suggestion that such considerations are permissible in light of certain language in the Third Circuit's second opinion is not persuasive.

the seniority rights arise out of the absorption and the Agreement, they must be determined as of the date of the absorption, and pursuant to the Agreement. No distinctions may be made on the basis of acts or employment occurring after the January 1964 absorption.

A second issue concerns the Joint Committee's inclusion of the second category of individuals, those hired by M & G subsequent to March 1964 who never worked for Eastern. These individuals were not involved in the controversy or the Court's order, and their seniority status was not properly before the Joint Committee.

A third issue involves the resolution of the fringe benefit question. Once again, the Joint Committee's responsibility was to determine these rights as of the January 1964 absorption and not at some subsequent time which it deemed appropriate.

Finally, the Court is of the opinion that the question of damages must be re-examined in light of the above infirmities in the Joint Committee's decision.

In spite of the plaintiffs' requests that the Court decide the seniority issue, the Court is of the opinion that the Joint Committee remains the appropriate body to make this resolution. The Joint Committee has repeatedly indicated its disagreement with and disapproval of the Third Circuit's holding that the record indicates that M & G absorbed Eastern's business within the terms of the Agreement. Nonetheless, this ruling is the law of the case and binding upon the Joint Committee. Therefore, it must hear and determine the seniority question under the Agreement in light of the finding that an absorption occurred. It must determine the plaintiffs' seniority rights under the Agreement at the time of M & G's absorption of Eastern's business. It must consider and determine all the separate aspects of the seniority question. Finally, after this determination is made, it must resolve the damage question.

The Court has not attempted to dictate the ultimate decision or to constrain the scope of the Joint Committee's discretion. However, it must require the Joint Committee to assume its responsibilities under the Agreement to render a good faith determination of the seniority issues involved herein.

For the reasons stated above, the defendants are enjoined from giving any effect to the Joint Committee's decision dated January 28, 1971, and the Joint Committee will be afforded sixty days to hear and determine the seniority questions presented herein in a manner which comports with the opinions of this Court, the Third Circuit Court and the Agreement to avoid being held in contempt for failure to comply with orders of this Court. In light of the Joint Committee's recalcitrant attitude toward acceptance of its responsibilities as stated in the opinions and orders of this and the Third Circuit Court, the Joint Committee shall state in detail the reasons for its decision on the seniority issues.

For the reasons stated above, it is hereby ORDERED:

1. The defendants are enjoined from giving any effect to the Joint Committee's decisions of January 25, 1971.

2. The Joint Committee is directed to hear and decide the disputed seniority rights in the manner set forth in the Court's order of January 7, 1971. Such decision shall be rendered in sixty (60) days and state in detail the reasons for the result reached.

3. This Court shall retain jurisdiction for the purpose of seeing that this and previous orders are appropriately complied with.

/s/ CALEB M. WRIGHT
Chief Judge

March 2, 1973